

C. DUKES SCOTT
EXECUTIVE DIRECTOR

P.O. Box 11263
Columbia, S.C. 29211



Phone: (803) 737-0800
Fax: (803) 737-0801

DAN F. ARNETT
CHIEF OF STAFF

nsedwar@regstaff.sc.gov

Nanette S. Edwards
Chief Counsel and Director of Legal Services

February 29, 2008

VIA EFILING

Mr. Charles L.A. Terreni
Chief Clerk/Administrator
Public Service Commission of South Carolina
101 Executive Center Dr., Suite 100
Columbia, SC 29210

Re: Petition of the Office of Regulatory Staff to Establish Dockets to Consider Implementing the Requirements of Section 1251 (Net Metering and Additional Standards) of the Energy Policy Act of 2005
Docket No.: 2005-385-E

Dear Mr. Terreni:

This letter is in response to and in support of Pamela Greenlaw's February 21, 2008 motion filed with the Public Service Commission of South Carolina ("the Commission") requesting the opportunity to participate in an additional net metering tariff hearing.

The South Carolina Office of Regulatory Staff ("ORS") respectfully submits that Docket No. 2005-385-E is subject to the Administrative Procedures Act ("APA") as this matter is a contested case. The APA defines a "contested case" as a "proceeding ... in which the legal rights, duties or privileges of a party are required by law to be determined by an agency after an opportunity for hearing."¹ The Commission is an "agency" as defined by the APA, and this proceeding was originally initiated December 12, 2005 by ORS's Petition to "Establish Dockets to Consider Implementing the Requirements of Section 1251 (Net Metering and Additional Standards) of the Energy Policy Act of 2005."

Pursuant to the APA, all parties must be given thirty days' notice prior to a proceeding in a contested case including the statutory authority under which the proceeding is to be held.² On February 7, 2008 during the Commission's agenda meeting, the Commission moved to instruct its staff to set a time on February 14, 2008 for companies subject to this docket to come before

¹ S.C. Code Ann. § 1-23-310(2) and (3).

² S.C. Code Ann. § 1-23-320(a) and (b)(2). The Freedom of Information Act ("FOIA") also has a notice provision wherein public bodies must provide public notice at least twenty-four hours prior to convening. S.C. Code Ann. § 3-4-80(a). FOIA, however, does not supersede or repeal the APA's thirty-day notice requirement. The APA sets forth procedures for gathering evidence while FOIA's purpose is to simply ensure public business is performed in an open and public manner. S.C. Code Ann. § 30-4-15.

the Commission and explain its respective net metering tariff. In this action, the Commission noted that the companies may be subject to questioning by the Commissioners and its staff. On February 8, 2008, a notice was issued for the February 14, 2008 proceeding.³ The notice did not include the statutory authority under which the Commission was holding the proceeding. ORS respectfully submits that the Commission failed to provide thirty-days notice for the proceeding and to include the requisite statutory authority with the notice as required by the APA.

The APA also requires that all parties have the opportunity to respond and present evidence and argument on all issues involved.⁴ This opportunity was not afforded to all parties. Specifically, Order No. 2008-101 states, "This proceeding will be in the form of a briefing for the Commission and will not involve sworn testimony or cross-examination by other parties." The February 14, 2008 proceeding's structure was carried out as set forth in Order No. 2008-101 in violation of the APA.

Lastly, the APA states that findings of fact shall be based exclusively on the evidence and on matters officially noticed.⁵ The February 8, 2008 notice, as well as Order No. 2008-101 issued in this docket, state the tariffs need to be more fully explained before the Commission takes a deciding vote. The February 8, 2008 notice and Order No. 2008-101 indicate the Commission's approval of the tariffs will be dependent on the February 14, 2008 proceeding. As stated earlier, this proceeding was not properly or officially noticed.⁶ To treat the matters set forth in this proceeding as evidence⁷ would be in error.

For the forgoing reasons, ORS respectfully requests that the parties and members of the public be afforded an opportunity to express their concerns regarding the tariffs.⁸

Notwithstanding the above, excluding public participation in this proceeding where the Commission is considering the approval of the proposed net metering tariffs is not in the public interest.⁹

³ The notice is entitled "Notice of Briefing." There is no "briefing" procedure under the APA. ORS respectfully submits that by labeling the hearing a briefing does not remove it from the APA's definition of a contested case and the thirty-day notice requirement. See also Winter v. Pratt, 258 S.C. 397, 189 S.E.2d 7 (1972) with the holding that one cannot do indirectly what the law will not allow directly.

⁴ S.C. Code Ann. § 1-23-320(e). See S.C. Const. art. 1, § 22, "No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard...." See also Stono River Environmental Protection Association v. SCDHEC, 305 S.C. 90, 406 S.E.2d 340 (1991) wherein the South Carolina Supreme Court determined that intervenors were entitled to notice and the opportunity to be heard.

⁵ S.C. Code Ann. § 1-23-320(i).

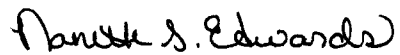
⁶ The Commission previously held a hearing which was in compliance with the APA but was held prior to the filing of the proposed tariffs which were the subject of the hearing held on February 14, 2008.

⁷ S.C. Code Ann. and § 1-23-320(i). See also § 1-23-330(1), "Except in proceedings before the Industrial Commission, the rules of evidence as applied in civil cases in the Court of Common Pleas shall be followed."

⁸ At the February 14, 2008 proceeding, ORS submitted an objection on the grounds that the proceeding did not comply with the APA because thirty days' notice was not provided, cross-examination was not allowed and there was no sworn testimony.

⁹ ORS represents the public interest as that term is defined by S.C. Code Ann. § 58-4-10 (Supp. 2007).

Sincerely,

A handwritten signature in black ink that reads "Nanette S. Edwards". The script is cursive and fluid, with the first name "Nanette" being more prominent than the last name "Edwards".

Nanette S. Edwards, Esquire

cc: Len S. Anthony, Esquire
 Richard L. Whitt, Esquire
 K. Chad Burgess, Esquire
 Pamela Greenlaw
 John F. Hardaway, Esquire
 Catherine Heigel, Esquire
 Mel Jenkins
 David Odell
 Libby Smith (via e-mail)
 Catherine D. Taylor, Esquire
 Ruth Thomas